UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF TENNESSEE
SOUTHERN DIVISION

In re:

LOWRY HOLDEN JONES

Debtor

Case No. 03-13147
Chapter 7

DEBORAH GONYER, DONALD TANGWALL, and JAMES NEAL

Plaintiffs

v.

LOWRY HOLDEN JONES

Defendant

Adversary Proceeding
No. 03-1129

MEMORANDUM

Appearances: Deborah Gonyer, Donald Tangwall and James Neal, Pro Se

Kyle R. Weems and Michael D. Ronan, Weems & Associates, Chattanooga, Tennessee, Attorneys for Defendant

HONORABLE R. THOMAS STINNETT
UNITED STATES BANKRUPTCY JUDGE

The complaint alleges that Mr. Jones, the Chapter 7 debtor, owes the plaintiffs a debt that can not be discharged in his bankruptcy case. 11 U.S.C. § 523(a). The court previously granted summary judgment to the debtor. The question now before the court is whether to grant or deny the plaintiffs' motion to reconsider the summary judgment.

The debtor was in the home construction business, and entered into a contract to build a home for Deborah Gonyer, one of the plaintiffs. Ms. Gonyer sued the debtor in state court and obtained a judgment against him for about $47,000. The allegations of the state court complaint can be summarized as follows:

> The debtor was in home construction business.
>
> In early April 2000 the debtor and Ms. Gonyer entered into a contract for the debtor to build a house for her.
>
> During Ms. Gonyer's dealings with the debtor, he falsely represented to her that he was licensed by the state of Tennessee.
>
> The debtor falsely or negligently represented to Ms. Gonyer and her construction lender that the job could be done in six months. This resulted in the construction loan being set up on a six months basis.
>
> Ms. Gonyer made numerous demands for the debtor to complete the house, and the debtor made excuses. The debtor represented to her that the house would be finished in the first week of January 2001, and she could plan on moving in at that time.
>
> In reliance on this representation, Ms. Gonyer quit her job and moved from Florida to Tennessee only to find out the house was not finished. She was forced to rent a motel room and store her belongings.
>
> Debtor did not do any work on the house in the next week, and Ms. Gonyer hired an attorney. On January 19, 2001, they sent notices to the debtor that unless he finished the house within 15 days, Ms. Gonyer would hire another contractor to finish the job. The debtor did not respond.

> Ms. Gonyer hired another contractor who finished the job. Completing the job required the correction of defective work by the debtor, such as a leaking roof, improperly ventilated plumbing, and a too short chimney.
>
> The debtor breached the contract by failing to complete the house on time and to construct it in a workmanlike manner, and Ms. Gonyer should recover damages for the breach, including the cost of completion and the cost of correcting defective construction by the debtor. (Count 1)
>
> Ms. Gonyer should recover any profit paid to the debtor because an unlicensed contractor is not entitled to any profit on a contract. (Count 2)
>
> Ms. Gonyer should recover as damages (not to exceed $40,000): (1) the cost of correcting the debtor's defective construction (not to exceed $5,000); (2) additional costs Ms. Gonyer incurred as a result of the debtor's delay in completing the house, such as additional moving expenses, motel costs, and lost wages (not to exceed $5,000); (3) liabilites, if any, to unpaid subcontractors and suppliers; (4) cost of completing the house up to $20,000; (5) the profit, if any, that Ms. Gonyer paid to the debtor; (6) fees for Ms. Gonyer's attorney.

The state court held a hearing on damages and entered a judgment for $46,991.75. The judgment does not explain the state court's calculations.

The complaint in this court alleges the judgment debt should be excepted from discharge as a debt resulting from fraud, false pretense, or false representations by the debtor. 11 U.S.C. § 523(a)(2)(A). The complaint alleges only one false representation – the debtor's representation that he had a state contractor's license. The following chronology sets out the events relevant to the plaintiffs' motion to reconsider the summary judgment.

August 26, 2003

The debtor files a motion for summary judgment with his own affidavit to support it. In his affidavit, the debtor states that when Ms. Gonyer entered into the contract with him, she knew he was not licensed by the state because she signed a release form entitled "Release of Liability of Non State Licensed Contractor". The motion includes a copy of the form with what appears to be Ms. Gonyer's signature. The debtor also states that the construction lender, Union Planters Bank, required references from his subcontractors because it knew he was not licensed by the state. The local rules and the scheduling order entered in this proceeding required the plaintiffs to file a response to the debtor's summary judgment motion within twenty days (20). E. D. Tenn. Bankr. Loc. R. 7007-1.

September 15, 2003

The twenty days for filing a response to the debtor's motion ends without the plaintiffs having filed a response. Thus, the court is faced with: (1) a complaint relying solely upon the alleged false representation by the debtor that he had a state contractor's license; (2) evidence from the debtor that when Ms. Gonyer entered into the contract with the debtor, she knew he did not have a state contractor's license; and (3) no evidence to refute the debtor's evidence.

September 19, 2003

Four days later the court still has not received a response by the plaintiffs to the debtor's motion for summary judgment. The court grants summary judgment to the debtor.

September 26, 2003

The plaintiffs file a combined response to the motion for summary judgment and motion for additional time to respond. Ms. Gonyer denies signing the release form that was the basis of the debtor's summary judgment motion. She asserts that her signature on the form is a forgery.

The response also requests additional time to respond to the summary judgment motion. In this regard, the response states: (1) the plaintiffs have subpoenaed records that they believe will disprove the debtor's claim; (2) the plaintiffs need further discovery to form a response to the debtor's motion; (3) discovery of the bank's records will show that they do not include the release form.

September 29, 2003

The plaintiffs file the motion for reconsideration of the summary judgment for the debtor. The motion makes the following statements:

> The plaintiffs mailed their combined response to the motion for summary judgment and request for additional time on September 19, the day the court entered the summary judgment.
>
> The plaintiffs were surprised by the release form.
>
> Ms. Gonyer denies signing it and states that her signature is a forgery.
>
> Being aware of the criminal penalties for presenting false evidence, the plaintiffs asked for additional time to respond to the motion so that they could check the bank's file to see if it included the release form.
>
> On September 24, 2003, Ms. Gonyer and two bank employees reviewed the bank's loan file and did not find the release form.

The motion and the supporting brief also argue that res judicata and collateral estoppel, as a result of the state court judgment, prevent the debtor from relying upon the release form.

September 30, 2003

The debtor files a brief in support of his motion for summary judgment.

October 1, 2003

The debtor files a response to the motion for reconsideration. The response is supported by another affidavit from the debtor. The affidavit states:

> In April 2000 the debtor faxed the contract and the release form to Ms. Gonyer in Florida, and she faxed back the signed signature page of the contract.
>
> In May 2000 Ms. Gonyer met with the debtor and his foreman, Barry Lynn, at the work site for the purpose of staking out the house. She signed the contract and the release form then, and in return she had the debtor execute an insurance release form.
>
> The debtor routinely required owners to sign the release, and there was no reason not to have Ms. Gonyer sign one.
>
> Ms. Gonyer was required to obtain the building permit because, as an unlicensed contractor, the debtor could not. Ms. Gonyer paid for the permit as shown by the building commissioner's receipt dated May 24, 2000.

The response is also supported by an affidavit from Barry Lynn, who identifies himself as the debtor's employee from time to time. Mr. Lynn agrees with the debtor's statement that Ms. Gonyer signed the contract and the release form in May 2000 when she met with him and the debtor at the work site for the purpose of staking out the house. Mr. Lynn states that Ms.

Gonyer had the debtor sign an insurance release form at the same time. Finally, Mr. Lynn states that the debtor routinely required owners to execute a release form such as the one in question.

DISCUSSION

The plaintiffs' motion to reconsider was filed within ten days after entry of the summary judgment. It does not specifically rely on any procedural rule. This raises the question of whether the court should treat the motion as coming under Rule 59 or Rule 60, which apply in bankruptcy proceedings as provided in Bankruptcy Rules 9023 and 9024. Fed. R. Bankr. P. 9023 & 9024; Fed. R. Civ. P. 59 & 60.

Rule 59 applies to a motion for a new trial or a motion to alter or amend a judgment. Fed. R. Civ. P. 59(a), (e). Either kind of motion must be filed within ten days after entry of the judgment. Fed. R. Civ. P. 59(b), (e); Fed. R. Bankr. P. 9006(b)(2).

Rule 60(b) sets out six grounds for relief from a final judgment or order. The motion must be filed within a reasonable time after entry of the judgment, but not more than one year later as to the first three grounds. Fed. R. Civ. P. 60(b).

The court of appeals for this circuit has not reported a decision that Rule 59 controls – to the exclusion of Rule 60 – if the motion was filed within ten days after entry of the judgment. Indeed, such a rule would appear to contradict plain meaning of Rule 60(b). It would amount to adding a requirement that the motion must be filed *more than* ten days after entry of the judgment. (It could also mean that "final" has two different meanings – that a judgment which is final when entered for the purposes of filing an appeal is not final under Rule 60(b) until the time for appeal expires without the filing of a notice of appeal.)

When the motion is filed within ten days after the judgment, and it relies on both rules or neither, the logical and fair method for the trial court to deal with the motion is to treat it as coming under both rules. The question, then, is whether the moving party has proved grounds for relief under either rule. *Cf. Perez-Perez v. Popular Leasing Rental, Inc.*, 993 F.2d 281 (1st Cir. 1993); *Feinstein v. Moses*, 951 F.2d 16 (1st Cir. 1991); *Hood v. Hood*, 59 F.3d 40, footnote 1 (6th Cir. 1995); *Szybist v. Summers (In re Summers)*, 150 B.R. 129 (Bankr. M. D. Pa. 1993).

In the case of a summary judgment, a leading treatise states that the grounds for relief from a summary judgment under Rule 59(e) substantially overlap the grounds stated in Rule 60, and the courts look to the substance of the motion rather than the form. 11 Charles A. Wright, et al., *Federal Practice and Procedure* § 2817 at 181-184. In other words, a motion for relief from a summary judgment, if filed within ten days after the judgment, can be dealt with under Rule 59 or Rule 60.

This method of dealing with motions filed within ten days of the judgment is especially appropriate when the motion was filed *pro se*, as in this proceeding. The court should interpret the motion liberally in favor of the moving party. *Kirkland v. Runyon*, 887 F.Supp. 1001 (S. D. Ohio 1995).

Other courts have held that a motion filed within ten days after entry of a judgment can only be a motion under Rule 59. *See, e.g., Amoco Production Co. v. Fry*, 908 F.Supp. 991 (D. D. C. 1995); *In re Halko*, 203 B.R. 668 (Bankr. N. D. Ill. 1996). The court disagrees with that result for the reasons already given.

The court begins with Rule 60(b). It sets out six grounds for relief from a final judgment, but only four possibly apply to the facts of this proceeding:

> (b)(1) mistake, inadvertence, surprise, or excusable neglect;
>
> (b)(2) newly discovered evidence that by due diligence could not have been discovered in time to move for a new trial;
>
> (b)(3) fraud (intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party;
>
> (b)(6) any other reason justifying relief from the operation of the judgment.

Fed. R. Bankr. P. 9024; Fed. R. Civ. P. 60(b).

Rule 60(b)(6) does not apply because the facts asserted by the plaintiffs to justify relief from the summary judgment are not out of the ordinary. *Steinhoff v. Harris*, 698 F.2d 270 (6th Cir. 1983). Indeed, the facts fall within the ambit of Rule 60(b)(1), (2), or (3).

Rule 60(b)(1) may apply. Events after entry of the summary judgment reveal a genuine issue of material fact, the question of whether the debtor falsely represented to Ms. Gonyer that he was licensed by the state, or Ms. Gonyer knew, as a result of signing the release form, that the debtor was not licensed by the state. If the plaintiffs had raised this dispute in a timely response to the summary judgment motion, the court would not have granted summary judgment. The question is whether the summary judgment can be set aside because the plaintiffs' failure to file a timely response can be excused as the result of mistake, inadvertence, surprise, or excusable neglect.

The leading case on the meaning of excusable neglect is *Pioneer Investment Services Co. v. Brunswick Associates Limited Partnership*, 507 U.S. 380, 113 S.Ct. 1489, 123 L.Ed.2d 74 (1993). In *Pioneer Investment* the supreme court set out general factors the courts should consider in deciding whether there was excusable neglect: (1) the causes of the delay; (2)

whether the movant had reasonable control over the causes of the delay; (3) whether the movant acted in good faith; (4) the length of the delay; (5) the impact of the delay on the judicial proceedings; and (6) the prejudice to other parties. *Pioneer Investment*, 113 S.Ct. 1489, 1498.

Perhaps the plaintiffs could have filed a timely response in which Ms. Gonyer simply denied any memory of signing the release form and asserted the forgery of her signature. They were not comfortable with such a response and wanted to conduct a search to be sure the signed form was not somewhere in the records of the transaction. Of course, they could have filed a motion for more time to respond before the twenty days expired, but they failed to do so. The court suspects that if the plaintiffs were represented by a lawyer, they would have filed a timely response or motion for additional time. But the plaintiffs are representing themselves, they were surprised by the release form, and they were reluctant to respond without further investigation because they did not want to make false statements to the court. The plaintiffs obviously acted in good faith. The plaintiffs filed their response and motion for more time eleven days late. Eleven days is not significantly late. Indeed, the court often will not deal with a summary judgment motion until well after the twenty days has passed even though no response was filed within the twenty days.

At this point, the debtor has won this lawsuit. If the court vacates the summary judgment, it will take away the debtor's victory and force him to continue defending this lawsuit. That kind of prejudice is not enough by itself to justify denying the plaintiffs' motion to vacate the summary judgment. If the law were otherwise, the courts might be unable to vacate any order. The court is concerned with prejudice to the debtor from the plaintiffs' tardiness in responding to the summary judgment motion and prejudice to the debtor as the result of actions he may have taken

in reliance on the summary judgment in his favor. The evidence does not show any prejudice of either kind.

The evidence also does not show any prejudicial impact on the bankruptcy case or this adversary proceeding. Of course, the court will be faced with additional activity in this adversary proceeding if the summary judgment is vacated. That is not the kind of negative impact on judicial proceedings that weighs against vacating the summary judgment.

The court concludes that the summary judgment should be set aside because the plaintiffs' failure to file a timely response to the debtor's motion was the result of excusable neglect. The court must point out another reason for setting aside the summary judgment.

The plaintiffs' response and motion to reconsider allege in essence that the debtor committed fraud on the court by presenting a false document and false testimony to obtain the summary judgment. Fraud on the court is a ground for setting aside a judgment under Rule 60. Fed. R. Civ. P. 60(b)(3).

The question of fraud is also relevant under Rule 59. The court can set aside a judgment and order a new trial if the prevailing party obtained the judgment on the basis of false testimony at a trial. Fed. R. Civ. P. 59(a); *Abrahamsen v.Trans-State Express, Inc.*, 92 F.3d 425 (6th Cir. 1996); *Davis v. Jellico Community Hospital, Inc.*, 912 F.2d 129 (6th Cir. 1990). The same rule should apply to a summary judgment obtained by the use of false evidence. *Johnson v. Verisign, Inc.*, 89 Fair Empl.Prac.Cas. (BNA) 769, 2002 WL 1887527 (E.D.Va. Aug. 15, 2002). It should make no difference that Rule 59(e), rather than Rule 59(a), may be the rule that applies to a summary judgment. *Browne v. Signal Mountain Nursery, L. P.*, 286 F.Supp.2d 904 (E. D. Tenn. 2003). In this regard, the grounds for granting a new trial and the grounds for altering or

amending a judgment under Rule 59(e) substantially overlap. 11 Charles A. Wright, et al., *Federal Practice and Procedure* §§ 2805 & 2810.1.

Thus, if the plaintiffs are not entitled to relief from the summary judgment under Rule 60(b)(1), the court is still faced with the question of relief under Rule 59 or Rule 60(b)(3) on the basis of fraud on the court. Furthermore, the court must conduct an evidentiary hearing to decide that question because the evidence now before the court is inconclusive, and the credibility of the witnesses is crucial. *Sherrier v. Richard*, 624 F.Supp. 918 (S. D. N. Y. 1985); *TAS International Travel Service, Inc. v. Pan American World Airways, Inc.*, 96 F.R.D. 205 (S. D. N. Y. 1982). The problem is that a hearing on the alleged fraud will involve the primary issue under the complaint – whether the debtor misrepresented to Ms. Gonyer that he was licensed by the state. In such a situation, the court should set aside the summary judgment and decide all the issues raised by the complaint.

The court will enter an order vacating the summary judgment. The court will also vacate or amend other pre-trial orders as needed.

This Memorandum constitutes findings of fact and conclusions of law as required by *Fed. R. Bankr. P.* 7052.

ENTER:

BY THE COURT

R. THOMAS STINNETT
UNITED STATES BANKRUPTCY JUDGE

(Entered 1/5/04)